No. 110

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Supreme Court of the United States

OCTOBER TERM, 1945.

CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, individually and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS,

Petitioners,

vs.

JOSEPH GRASSO,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

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JOSEPH GRASSO,

Respondent.

BRIEF ON BEHALF OF RESPONDENT.

Statement of Facts.

Respondent was employed by petitioners for many years, up to the time of his induction into the U. S. Army under the provisions of the Selective Training & Service Act of 1940 and Service Extension Act of 1941. He was discharged from the army on October 5, 1943. About ten days later, he called at petitioners' plant, spoke to Charles M. Crowhurst, and requested a leave of absence (A. 12a).

At that time there was in force a collective agreement between a trade union which was bargaining representative for the employees, and petitioners. This agreement covered leaves of absence and provided that they would be granted only for definite periods of time and after examination by the employer's physician (A. 35a, Exhibits R. 4, R. 5).

Crowhurst did not deny the request for leave of absence, but insisted that respondent be examined by the company doctor (A. 13a, 35a). Respondent submitted to such examination by the plant physician, Dr. Crecca, who insisted that respondent was totally unfit for work as a result of a flat foot condition (A. 13a, 14a, 38a).

Respondent again saw Crowhurst (A. 14a). Respondent testified that he asked to go to work forthwith, but the petitioners deny this (A. 15a, 36a).

Petitioners refused to reinstate respondent because of Dr. Crecca's report that respondent was unable to discharge the duties of his position (Answer to Petition, A. 9a).

In the pleadings as filed in the District Court of the United States for the District of New Jersey, the employer raised two issues:

1. That respondent was physically incapacitated from performing his duties.
2. That no application for reemployment had been made within the forty-day statutory period (Answer to Petition, A. 8a, 10a).

On the first point, the trial court found against the employer, petitioners herein (A. 54a), saying:

> "* * * he is not disqualified for his position as a tacker in [the] tannery".

On the second point, the trial court found that the request for leave of absence neither amounted to nor included a request for reemployment within the meaning of the Federal statutes above cited.

The Circuit Court of Appeals for the Third Circuit found to the contrary on that point, and ordered reinstatement. They so found on appeal, in which the sole question presented by the employee, who was the petitioner-appellant below, was:

> "Does application for leave of absence constitute application for reemployment within the meaning of Section 8 (b) (3) of the Selective Training and Service Act, 54 Stat. 885, U. S. C. A. Title 50, App. Sec. 309 (b) (3)?"

The Circuit Court of Appeals in overruling the District Court, had necessarily to rule on all the circumstances connected with the refusal of reemployment. All of these were put directly in issue on the appeal below, by the phraseology of the question there involved, as above quoted. They are also within the scope of the employee's "Statement of Points", as filed in connection with his appeal.

The Circuit Court of Appeals made no order specifically setting aside the trial court's Finding of Fact No. 19, but essentially ruled only that "Grasso had made timely application for reemployment".

The employer now seeks to review this decision on certiorari, and in so doing presents a claim that the ruling below went beyond the statement of the question involved in the appeal below.

ARGUMENT.

POINT I.

Respondent's application for leave of absence constituted application for re-employment within the meaning of Section 8 (b) (3) of the Selective Training and Service Act of 1940.

Reemployment does not necessarily mean an immediate return to actual labor, but rather the resumption of the employee status and the master-serveant relationship, just as employment does not necessarily mean actual labor, but rather the employee status and the master-servant relationship.

> "Employment: Act of employing, state of being employed; as, to seek employment." *Webster, New International Dictionary.*
>
> "Employee: The word 'employee' as used in this Chapter, means a worker in his relation.
>
> (a) to the employer by whom he is employed, whether he is actually working or is on leave or is temporarily laid off, and
>
> (b) during a strike or lockout, to the employer by whom he was employed and against whom he is on strike or by whom he is locked out." *Restatement, Law of Torts, §776.*

It is common industrial practice for employees to secure from their employer a leave of absence, during which they remain as employees, and retain all benefits, such as seniority, group insurance and the like, flowing from the employ-

ment status. The same is true when an employee is "laid off", which in industrial parlance has the fully understood meaning of temporary cessation of work, during which remuneration ceases, but which does not terminate the employment relationship.

The familiar doctrine that one injured going to or from work, but not actually at work has sustained a compensable injury, is based upon the principle " * * * that the terms 'work' and 'employment' are not synonymous."

Grady v. *Nevins Church Press Co.*, 15 N. J. Misc. 190;
Terlecki v. *Strauss*, 85 N. J. L. 454.

As the court said, in

Scott v. *Payne Brothers*, 85 N. J. L. 446,

> "Employment within the meaning of the [Workmen's Compensation] statute refers rather to the contract than to the labor done in pursuance of the contract."

The meaning of the term "employment" has frequently arisen in determining whether group life insurance policies covering only employees, apply to one who at the time of his death was not regularly working. In such cases the courts have unanimously held that the term "employment" refers to the status and to the relationship, which may continue although the employee is not regularly working at the time of his death.

Emerich v. *Conn. General Life Insurance Co.*, 120 Conn. 60; 105 A. L. R. 413;
Perkins v. *Eagle Lock Co.*, 118 Conn. 658;

Pearson v. *Equitable Life Assur. Soc.*, 212 N. C., 731;
Ambrose v. *Metropolitan Life Ins. Co.*, 18 N. J. Misc. 42.

In the *Ambrose* case the court said:

> "In the policy there are such phrases as: 'termination of employment;' 'ceased to be in its employ;' 'left said employment;' and 'while the employe is in the employ of the employer.' An examination of the policy evinces that these phrases refer to the existence of the relationship of employer and employe and to the status or position of the deceased in that regard at the time of his death. The word 'employment' is intended to indicate the status of the holder of the certificate in relation to his employer. The phrase 'termination of employment' assuredly does not mean the mere cessation of active service. This becomes at once apparent from the discovery in the policy of the following provision. 'Lay-off or Leave of Absence, of two months or less, shall not be considered, * * * termination of employment within the meaning of this Policy unless notification to the contrary shall have been given by the Employe to the Company, &c.' The policy obviously did not contemplate steady and constant service by the employes. An employe might only work one or more days in a fortnight and still continue to be in the employ of the company. The phrases previously quoted must mean such a termination of the relationship of employer and employe as will make applicable and effective all parts of the insurance contract."

Similar holdings are found in cases interpreting wills making bequests to employees.

Boyle v. *Howe*, 126 Fla. 662;
Cox v. *Brown* (Mo.) 50 S. W. (2d) 763.

See also the Federal cases holding that ships are engaged in the slave trade, although not carrying slaves when apprehended.

U. S. v. *Morris*, 39 U. S. (14 Pet.) 464, 475; 10 L. Ed. 543;
U. S. v. *Catherine*, 25 Fed. Cas. 332, 338.

It is familiar law that striking employees do not sever the employment relation solely because they are not working.

Mengel v. *Justices of the Superior Court*, 313 Mass. 238;
MacPherson Hotel Co. v. *Smith*, 129 N. J. Eq. 167

It is true, as petitioners state on page 10 of their brief, that the statute "specifically states that an employee shall be considered as having been on furlough or leave of absence during his period of training and service." However, that does not change the fact that when Grasso asked his employer for a leave of absence he thereby asked for the resumption of his employment relation with petitioners. By so asking, respondent sought to transfer the leave of absence created by statute into restoration to full employment, plus a leave of absence created by agreement between himself and his employer.

The court below recognized that fact, and said:

> "Obviously, to ask for a leave would imply that the one making such a request was presently employed in a job from which the leave is sought. My view of it is that such a request amounts to nothing more

than asking the employer to simultaneously reinstate the applicant and give him an immediate vacation." (A. 58a).

One does not ask for a leave of absence from a job unless he holds the job.

POINT II.

Petitioners may not escape their obligation under Section 8 (b) (3) of the Selective Training and Service Act merely because respondent did not press his application for re-employment after being advised by petitioners' agent that he was physically unable to perform the duties of his job.

When Grasso made his request for reinstatement and vacation, petitioners understood the request. They did not overlook the implications of either of the two points therein involved. This is implicit in petitioners' treatment of respondent's application for the leave of absence. Crowhurst required Grasso to follow the procedure fixed by the collective bargaining agreement as to the request *of an employee* for a leave of absence. He sent Grasso to the company physician for examination.

Dr. Crecca examined Grasso and rendered a totally erroneous report. He advised both the petitioners and the respondent that respondent was unable to perform the duties of his job. Observe that petitioners did not merely make the granting of a leave of absence dependent upon the doctor's report; *they made the entire request for reem-*

ployment dependent upon Dr. Crecca's report. That report was not that Grasso should not get a leave of absence, but that Grasso should not be permitted to work at all.

On what was Dr. Crecca to report? Only on Grasso's physical condition. He might conceivably have reported, (1) that Grasso's general condition was such that no vacation or period of recreation was needed; or (2) that while Grasso was fit for his job, his general condition was such as to justify a period of rest or recreation; or (3) that his physical condition was such that he could not then, nor at any time in the foreseeable future, ever be able to resume his job.

If the doctor had given the first answer, petitioners' course would have been to inform Grasso that his job was waiting for him provided he actively assumed his duties at once.

Following the second possible answer, petitioners would still have been legally justified in insisting on immediate return to work, but would have been perhaps morally obligated to grant job restoration and also allow the recreational period asked for.

But the doctor gave Answer No. 3. Accordingly, petitioners refused both parts of respondent's request, both the request for restoration to his employment and the request for vacation.

When Dr. Crecca told Grasso that he could not work at all he was acting as the chosen agent of the petitioners. In legal effect it was the petitioners who informed Grasso that he could not work because of his physical condition. And

petitioners openly declare that they did not re-employ Grasso because of Crecca's report (A. 31a; 9a; par. 4 of Answer to Petition).

Thereupon Grasso, acting on Dr. Crecca's statement, which was chargeable against petitioners, made no further move toward obtaining his desired reemployment. Instead, as the court below found, he withdrew. That was not a voluntary withdrawal. It was not a deliberate, knowing relinquishment by Grasso of his rights under the Act. It was clearly impelled solely by reliance on the false reports given him by petitioners respecting his physical condition (A. 36a, 38a, 40a, 47a).

What if Dr. Crecca had rendered a true report and had advised Grasso that he was perfectly capable of performing his duties on the job? Plainly, Grasso would not under those circumstances have come back and said "Well, that's that" (A. 40a) and that Dr. Crecca had said he was in no condition to work (A. 47a) and that he wanted papers to get some other job for which he was capable.

It is very evident that petitioners did in fact tell Grasso that they would not re-employ him. They did so by informing him that his physical condition made it impossible for them to put him back on his job.

To permit this veteran's employer to create (by erroneous, improper or untruthful statements) the conditions which induced the veteran to withdraw from his request for re-employment and then to deny him re-employment because he has so withdrawn, is scarcely to effectuate the Congressional intent to secure to the veteran his old job

provided he makes timely indication that he wants it and is still able to perform it.

If the rights of the veteran are not to crumble before the innumerable variety of technical and legalistic defenses which recalcitrant employers can always find in the complex relationship surrounding industrial employment, the right of this veteran to re-employment must be upheld.

POINT III.

The Circuit Court committed no error in respect to the trial court's Finding of Fact No. 19.

Petitioners urge that the Circuit Court erred in "setting aside" the District Court's Finding of Fact No. 19. It is familiar doctrine that the court speaks through its orders and decrees only. We are not aware of any order or decree "setting aside" Finding of Fact No. 19. Petitioners' real objection is that the end result of the Circuit Court's ruling appears to petitioners to be in variance with Finding of Fact No. 19, and that, so petitioners state, "throughout the trial both sides assumed" the accuracy of the statements set forth in Finding of Fact No. 19. This claim is not substantiated by the record, and no reason appears why petitioners should hazard such a guess as to what was in respondent's mind.

The essential ruling of the trial court was solely that the form of Grasso's application for re-employment was such as did not amount to a request for re-employment within the meaning of the statute. The propriety of that

ruling was placed squarely in issue before the Circuit Court, which reversed. The Circuit Court did not go beyond the scope of the issue presented to it on appeal.

Conclusion.

Petitioners having failed to demonstrate either error or the probability of error in the ruling of the Circuit Court, the petition for writ of certiorari should be denied.

Respectfully submitted,

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